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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1983

RALPH KORN and ALEX SIEGEL,

Petitioners,

v.

RABBINICAL COUNCIL OF CALIFORNIA, an unincorporated association, MARVIN SUGARMAN, PINCHOSE GRUMAN, REUBEN HUTTLER, YALE BUTLER, MELVIN TEITLEBAUM, and SOLOMON SPITZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. In *Hygrade Provision Co. v. Sherman* (1925) 266 U.S. 497, this Court sustained against Fourteenth Amendment attack a New York state penal law which forbids passing off nonkosher goods as kosher, and hence requires a judicial determination of whether particular goods are kosher. This case presents the question whether the Fourteenth Amendment, in extending to the states the requirements of the First Amendment establishment clause, deprives state courts of subject matter jurisdiction to entertain and grant relief in ordinary civil litigation for defamation and restraint of trade on the ground that the determination of what is kosher is a religious question. The question has implications for the enforcement of the kosher food laws of 18 states and the District of Columbia.

2. The following subsidiary question is presented: Whether litigants are accorded due process of law by the following state court procedure: (1) a court of first instance announces its determination to sustain a demurrer to a multi-count complaint for lack of subject matter jurisdiction on the ground that a religious question is involved; (2) in reliance on that court's announcement of its intended decision plaintiffs waive their right to amend, in view of their evident inability to overcome the assertedly fatal defect perceived and announced by the court; (3) the demurrer is sustained without leave to amend and judgment is entered for the defendants; and (4) although on review the appellate court finds that certain causes of action were *not* vulnerable to the religious question objection, it affirms the judgment as to them too on the ground of plaintiffs' omission to anticipate and amend to overcome a technical pleading objection first asserted by the appellate court.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

The petitioners, Ralph Korn and Alex Siegel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate District, which was entered on October 28, 1983, after which the Supreme Court of California denied a discretionary hearing on December 22, 1983.

OPINION BELOW

The opinion of the Court of Appeal appears in Appendix 1 hereto. It was officially reported at 148 Adv. Cal. App. 3d 491 and unofficially at 195 Cal. Rptr. 910; however, when the Supreme Court of the State of California denied a hearing December 22, 1983, (Appendix 2) the Reporter of Decisions of the State of California was directed not to publish the opinion in the state's Official Appellate Reports.

JURISDICTION

The judgment of the Court of Appeal was entered October 28, 1983. The Supreme Court of California denied a hearing on December 22, 1983. On March 13, 1984, the time within which a petition for writ of certiorari may be filed to review said decision was extended to and including April 20, 1984, by order of the Honorable William H. Rehnquist, Circuit Justice. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) since rights were set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED FOR REVIEW

1. In *Hygrade Provision Co. v. Sherman* (1925) 266 U.S. 497, this Court sustained against Fourteenth Amendment attack a New York state penal law which forbids passing off nonkosher goods as kosher, and hence requires a judicial determination of whether particular goods are kosher. This case presents the question whether the Fourteenth Amendment, in extending to the states the requirements of the First Amendment establishment clause, deprives state courts of subject matter jurisdiction to entertain and grant relief in ordinary civil litigation for defamation and restraint of trade on the ground that the determination of what is kosher is a religious question.

The question has implications for the enforcement of the kosher food laws of 18 states and the District of Columbia.

2. The following subsidiary question is presented: Whether litigants are accorded due process of law by the following state court procedure: (1) a court of first instance announces its determination to sustain a demurrer to a multi-count complaint for lack of subject matter jurisdiction on the ground that a religious question is involved; (2) in reliance on that court's announcement of its intended decision plaintiffs waive their right to amend, in view of their evident inability to overcome the assertedly fatal defect perceived and announced by the court; (3) the demurrer is sustained without leave to amend and judgment is entered for the defendants; and (4) although on review the appellate court finds that certain causes of action were *not* vulnerable to the religious question objection, it affirms the judgment as to them too on the ground of plaintiffs' omission to anticipate and amend to overcome a technical pleading objection first asserted by the appellate court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

First Amendment:

". . . Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Fourteenth Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

This action was brought in the Superior Court, Los Angeles County, by Ralph Korn and Alex Siegel, kosher meat salesmen, Acme Meat Co., Inc., a meat packer, and the United Orthodox Rabbinate of Greater Los Angeles. The defendants were the Rabbinical Council of California and Marvin Sugarman, Pinchose Gruman, Reuben Huttler, Yale Butler, Melvin Teitlebaum, and Solomon Spitz, rabbis. The complaint was in seven counts, including claims for defamation (libel, slander, and disparagement of goods) and restraint of trade, both at common law and under federal and state statutes.

The complaint alleged that although the goods dealt in by plaintiff meat packer and salesmen were kosher, the defendants had publicly accused plaintiffs falsely of passing off nonkosher goods as kosher, and that the defendants had promoted a boycott of plaintiffs' goods but offered to call it off if they would employ one of the defendants as supervisor of kosher compliance and pay the compensation demanded for him.

The defendants demurred to the complaint for alleged lack of subject matter jurisdiction on grounds that included the First Amendment to the United States Constitution, asserting that the determination of whether goods are kosher was an ecclesiastical question which the court was constitutionally prevented from deciding.

The Superior Court sustained the demurrer to the entire complaint on the stated ground that the question of what is kosher "involv[ed] the court in eccliastic [sic] questions," but that court did not identify the legal principle it believed applicable.

Relying on the court's announced intention to sustain the demurrer on the stated ground of lack of subject matter

jurisdiction, counsel for plaintiffs believed it useless to amend, and accordingly, waived the right to do so. Judgment for the defendants followed.

On appeal by Korn and Siegel the state Court of Appeal affirmed (Appendix 1). As to five counts of the complaint affirmance was placed on the ground of the First Amendment, which "has been construed to prohibit the use of government for purposes which are essentially religious. . . . Thus, civil courts may not adjudicate questions which are primarily ecclesiastical in nature." As to the other two counts, affirmance was placed on the ground that they insufficiently pleaded damage, i.e., that they were deficient in a particular which had not been noticed or discussed in the lower court and that plaintiffs had waived their right to amend, for they had relied on the lower court's announcement of its intended decision and had not anticipated and cured a technical pleading defect that was first noticed on appeal.

Plaintiffs petitioned the Supreme Court of California for a hearing, which in state practice is discretionary in this type of case. The petition for hearing was denied December 22, 1983 (Appendix 2).

ARGUMENT

1. The question whether compliance with kosher standards is an exclusively religious question so as not to be justiciable should be approached from the standpoint of history (*Marsh v. Chambers* (1983) ____U.S.____, 77 L.Ed 2d 1019, 103 S.Ct. 3330; *Walz v. Tax Commission* (1970) 397 U.S. 664, 671), rather than from a "rigid, absolutist view" (*Lynch v. Donnelly,* No. 82-1256, decided March 5, 1984). Here, as often elsewhere, "a page of history is worth a volume of logic" (Holmes, J., in *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349).

For a century now there have been state laws against fraud in the sale of goods designated as kosher (Bernard J. Meislin, *Jewish Law in American Tribunals* (1976) pp. 179-180 — hereafter *Meislin*). In 1925 this Court dealt with a Fourteenth Amendment due process attack on a New York state penal law against fraud in the sale of meat offered as kosher. That law defined kosher as that which is "sanctioned by the orthodox Hebrew religious requirements." Thus, in order to maintain a prosecution under the statute it was necessary to establish not only the seller's fraudulent intent but also the nonkosher character of the goods offered for sale.

A suit to enjoin prosecution under the statute contained "allegations tending to show the impossibility or, at least, the great difficulty of determining what is kosher according to the Rabbinical law and the customs, traditions and precedents of the orthodox Hebrew religious requirements." But this Court held that "the evidence, while conflicting, warrants the conclusion that the term 'kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite." (*Hygrade Provision Co. v. Sherman*, 266 U.S. 497, 502.) Thus, compliance with kosher standards was held to be objectively verifiable and knowable by persons in the trade and hence subject to judicial determination. In this respect the case differed from those in which the courts have declined jurisdiction in deference to ecclesiastical authorities (*Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679; *Kedroff v. St. Nicholas Cathedral* (1952) 344 U.S. 94; *Presbyterian Church v. Hull Church* (1969) 393 U.S. 440; *Serbian Diocese v. Milivojevich* (1976) 426 U.S. 696).

The *Hygrade Provision Co.* case was decided before First Amendment requirements with respect to religion were extended to the states under the Fourteenth Amendment (*Cantwell v. Connecticut* (1940) 310 U.S. 296; *Everson v. Board of Education* (1947) 330 U.S. 1). But before as well as after decision of the *Hygrade Provision Co.* case this Court had held that questions of heresy, orthodoxy, and departure from religious doctrine were not justiciable (*Watson v. Jones* (1872) 80 U.S. (13 Wall.) 679, 728; *United States v. Ballard* (1944) 322 U.S. 78; *Presbyterian Church v. Hull Church* (1969) 303 U.S. 440, 446). *Watson v. Jones, supra,* was an 1872 decision based on general law, but was "nonetheless informed by First Amendment considerations" (*Presbyterian Church v. Hull Church* (1969) 393 U.S. 440, 445).

Thus, both before and since the *Hygrade Provision Co.* decision this Court has expressed the view that controversies over religious doctrine are not justiciable. The conclusion to be drawn from the *Hygrade Provision Co.* decision and its place in the development of constitutional law is that compliance with kosher standards is not a religious question, or at least not such an exclusively religious question as to oust the courts of jurisdiction to decide it according to objective secular criteria.

That compliance with kosher standards has religious value for the orthodox is obvious, but enforcement of those standards for the benefit of consumers in general does not offend against the First or Fourteenth Amendments, any more than does the enforcement of Sunday closing laws, which likewise have religious value for many; "The Establishment Clause does not always bar a state from regulating conduct simply because it 'harmonizes with religious canons'" (*Marsh v. Chambers* (1983) ____ U.S.____, 77 L.Ed. 2d 1019, 1027, 103 S.Ct. 3330, quoting from *McGowan v. Maryland* (1961) 366 U.S 420, 462).

Compliance with kosher standards is not of interest to the Jewish community alone. As was said of kosher meats in *People v. Atlas* (1918) 170 N.Y.S. 834, 835,

> "Such meat is selected with great care, and especial cleanliness is observed in the slaughter thereof, from which a reasonable inference follows that it is of a superior quality. The [kosher foods] statute does not limit the sale of such meat to orthodox Jews. The sale thereof is open to the public. The purpose of the statute, manifestly is to prevent and punish fraud in the sale of meats or meat preparation. . ."

"Religious question" defenses to prosecutions under kosher food laws have been rejected in New York and Florida in the only reported cases on the point that our research has turned up (*People v. Goldberger* (1916) 163 N.Y.S. 663, 666; *Sossin Systems, Inc. v. City of Miami Beach* (Fla. 1972) 262 So. 2d 28, 29-30). And in defamation cases courts have been willing to decide questions concerning compliance with kosher standards (*Cohen v. Eisenberg* (1940) 19 N.Y.S.2d 678; *Cabinet v. Shapiro* (N.J. 1952) 86 A.2d 314).

The foregoing precedents were among those that were called to the attention of the California Court of Appeal. It distinguished them on the asserted ground that in them "rabbinic authority" was "not in disagreement over whether the meat is kosher." But in *Cohen v. Eisenberg, supra,* and *Cabinet v. Shapiro, supra,* there *was* disagreement between rabbis, yet the courts still decided, just as they regularly decide other questions of custom and usage when doctors disagree. And the distinction the California court attempted to make is no distinction at all so far as the constitutional principle is concerned, for if, as it stated, "the determination of whether food is kosher is an

ecclesiastical question unsuitable for adjudication in civil courts," the courts would have no business delegating decision of the question even to unanimous "rabbinic authority," for that would indeed offend against the Establishment clause (*Larkin v. Grendel's Den* (1983) 459 U.S. 116).

In summary, then: in this case the California court extended the First (or Fourteenth) Amendment in a novel and unwarranted manner that is inconsistent in principle with this Court's decision in *Hygrade Provision Co. v. Sherman* (1925) 266 U.S. 479. The California court interposed the Amendment, thus extended, so as to deny access to the courts of that state for the adjudication of conventional claims that are regularly litigated elsewhere. Such mistaken application of the Amendment is prejudicial, not only to petitioners but also to all others interested in the observance of kosher standards.

2. The question whether the courts will entertain and decide questions of compliance with kosher requirements and hence enforce kosher laws is one of substantial importance, both in California and nationally. The most populous state in the Union, California is second among the states in Jewish population (754,480 according to the American Jewish Year Book, 1982). By 1976, the District of Columbia and 18 states, including the most populous, had statutes in force to protect purchasers of kosher food (Arizona, Arkansas, California, Connecticut, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wisconsin). According to an estimate made in 1917, a million Jews, two-thirds of the total Jewish population of New York City, consumed 156 million pounds of kosher meat annually. And in 1915 it was estimated that there were in New York City 5,000 retail butcher stores and 1,000

schochtim, or ritual slaughterers. In 1936 a court-appointed expert estimated the number of kosher poultry consumers in the Greater New York City area at 1.25 to 1.5 million. (*Meislin*, p. 180 and notes 31 and 32.)

A decision that on constitutional grounds refuses judicial recognition and enforcement of kosher standards is bound to have a demoralizing effect on the kosher trade and encourage fraud, to the disadvantage of the many consumers to whom observance of kosher standards is important. It is true that the decision of the state appellate court in this case will not appear in the state's official reports, but it will not be expunged from unofficial reports or from the memories of those who are vitally interested in the subject. It may be many years before another case offers an opportunity to review the question. For that reason the writ of certiorari should issue in this case.

3. We have also proposed for review the question whether the procedure employed by the state court in this case comports with minimum standards of fairness required by due process. We do not suggest that this Court sits for the correction of errors generally or that if presented alone the procedural question would merit certiorari review, but if, as we suggest, the writ should issue to review the religious question, the procedural question can appropriately be reviewed as well.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal of the State of California.

Respectfully submitted,

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APPENDIX

Appendix 1

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California

SECOND APPELLATE DISTRICT
DIVISION ONE

RALPH KORN, ALEX SIEGEL,

Plaintiffs
and Appellants,

v.

RABBINICAL COUNCIL OF CALIFORNIA, an unincorporated association, MARVIN SUGARMAN, PINCHOSE GRUMAN, REUBEN HUTTLER, YALE BUTLER, MELVIN TEITLEBAUM, SOLOMON SPITZ,

Defendants
and Respondents.

2d Civ. No. 67958
(Super. Ct. No. C 396373)

APPEAL from an order of dismissal of the Superior Court of Los Angeles County. John L. Cole, Judge. Affirmed.

Robert A. Von Esch, Jr. & Associates, and Robert A. Von Esch, Jr. and Mark F. Von Esch, for Plaintiffs and Appellants.

Richard A. Perkins as Amicus Curiae on behalf of Plaintiff United Orthodox Rabbinate of Greater Los Angeles.

Rafael Chodos for Defendants and Respondents.

INTRODUCTION

Plaintiffs Ralph Korn (Korn) and Alex Siegel (Siegel) appeal from an order of dismissal entered after the trial court sustained defendants' demurrer without leave to amend.

STATEMENT OF FACTS

On demurrer, all material facts properly pleaded and all reasonable inferences which can be drawn therefrom are deemed admitted. (*Glaire v. La Lanne-Paris Health Spa, Inc.* (1974) 12 Cal.3d 915, 918; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 713.) Plaintiffs' complaint discloses the following express and reasonably inferred facts.

Prior to February 1981, plaintiffs Korn and Siegel were the owners and operators of the Kosher Bosher Meat Company (Kosher Bosher), a slaughtering house selling exclusively to kosher butchers. In Los Angeles, defendant Rabbinical Council of California (RCC) is the rabbinical body entrusted by the Jewish community with the duty of determining whether meat has been slaughtered and prepared in strict compliance with traditional Jewish dietary laws. RCC's duties include advising the kosher food-consuming public whether meat purported to be kosher actually has been slaughtered and prepared in conformity with RCC's interpretation of Jewish law.

In February 1981, RCC and the defendant rabbis formed the opinion that Kosher Bosher's meat was not kosher; RCC removed its certification of Kosher Bosher and placed an advertisement in a newspaper of general circulation in the Jewish community announcing that Kosher Bosher's meat no longer warranted RCC's endorsement.[1] In addition, defendants distributed leaflets

[1] Plaintiffs allege in their second and third causes of action that defendants offered to reinstate their approval of plaintiffs' meat "if the

and letters to various distributors, butcher shops, markets and members of the general public stating that kosher certification had been removed from the products of Kosher Bosher.

In February 1981, Acme acquired all of Kosher Bosher's rights and responsibilities; Kosher Bosher dissolved as an entity. Korn and Siegel served as salesmen for Acme from the time of Kosher Bosher's dissolution to the present.

In June of 1981, one of the plaintiffs, United Orthodox Rabbinate of Greater Los Angeles,[2] under the leadership of Rabbi Juda Glasner (Glasner), agreed to fill the supervisory role vacated by RCC; Glasner proffered the opinion that Acme's meat was kosher. Defendant's continued to withhold their certification.

In Los Angeles, stores selling kosher meat usually display a sign indicating that meat for sale therein has been certified by defendants as kosher. Defendants threatened to remove such signs from any store or distributor dealing with Acme's meat.

PROCEDURAL BACKGROUND

Plaintiffs' complaint includes seven causes of action.[3] In their first and seventh causes of action, plaintiffs alleged

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(footnote continued from previous page)

plaintiff would pay the Defendant, SOLOMON SPITZ, the sum of $400.00 per month."

[2]United Orthodox Rabbinate of Greater Los Angeles, one of the original plaintiffs, has elected to file an amicus brief rather than appeal.

[3]Plaintiffs alleged the following causes of action: restraint of trade, violation of the Cartwright Act, violation of the Sherman Anti-trust Act, trade libel, trade slander and trade disparagement. For their seventh cause of action, plaintiffs seek an injunction ordering defendants to grant kosher certification to their meat products.

that defendants "wrongfully and unlawfully conspired among themselves . . . that the Kashrut supervision of Kosher meat would be removed from the products manufactured and distributed by Acme and Kosher Bosher."

With respect to the notices published in newspapers of general circulation in the Jewish community, in their fourth and sixth causes of action, plaintiffs alleged "said advertisements [noting that rabbinic endorsement had been removed from Acme's meat] are false as pertaining to the plaintiff Acme." In their fifth cause of action, plaintiffs alleged "Defendants had no probably [sic] cause for believing the statements to be true, ..."

At trial, the court indicated that it was willing to sustain defendants' demurrer with leave to amend; the court sustained defendants' demurrer without leave to amend, however, when plaintiffs' counsel indicated his belief that the complaint could not be amended to remove what the trial court considered a bar to its jurisdiction, i.e. the presence of an ecclesiastical issue. Plaintiffs' counsel noted "If the court feels that this would be an ecclesiastical problem which could not be overcome on demurrer, perhaps then to sustain without leave would speed the process up, ..."

Plaintiffs' notice of appeal was timely filed.

CONTENTIONS

I

For the following reasons, plaintiffs contend the trial court's decision to sustain defendants' demurrer without leave to amend due to a jurisdictional defect, i.e., the presence of an ecclesiastical issue, was erroneous:

A. By its demurrer, defendants have admitted plaintiffs' meat was kosher;

B. Rabbi Juda Glasner has certified Acme's meat is Kosher;

C. Sister states have repeatedly reached the merits of cases wherein the characterization of food as kosher was germane to the determination of a particular cause of action; and

D. The complaint does not require the court to determine any ecclesiastical issues.

II

Plaintiffs contend the trial court erroneously determined state courts lack jurisdiction over alleged violations of the Sherman Act.

III

Plaintiffs further contend their complaint adequately stated a cause of action for violation of the Cartwright Act.

DISCUSSION

I

In this case of first impression, plaintiffs proffer various arguments in order to convince this court the trial court erroneously determined plaintiffs' causes of action were barred by the presence of an ecclesiastical issue. We conclude that while plaintiffs' second and third causes of action are not so barred, plaintiffs' remaining causes of action are.[4]

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[4]As we will discuss herein, plaintiffs' second and third causes of action are barred on other grounds.

In that First Amendment[5] values are clearly jeopardized when the resolution of litigation turns on a civil court's determination of controversies concerning religious practice and doctrine (*Wilson v. Hinkle* (1977) 67 Cal.App.3d 506, 510), the First Amendment has been construed to prohibit the use of government for purposes which are essentially religious. (*Abington School District v. Schempp* (1963) 374 U.S. 203.) Thus, civil courts may not adjudicate questions which are primarily ecclesiastical in nature.

The determination of whether Acme's meat is kosher is an ecclesiastical question. A brief explanation of the Hebrew term *Kashrut* will clarify the role of rabbinic authority in supervising the slaughter and preparation of kosher meat. The term *Kashrut* is a collective term encompassing "the Jewish laws and customs pertaining to the types of food permitted for consumption" and the preparation of the permitted foods. (6 Encyclopaedia Judaica, Dietary Laws, p. 26.) Food which is kosher, therefore, is food of the type which is permitted and which has been prepared in conformity with Jewish law. When a rabbinic council expresses its approval of certain meat by certifying it as kosher, the council is in actuality certifying to the kosher meat-consuming public that the meat conforms with the council's interpretation of the requirements of Judaic law. As that law is open to interpretation,

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[5]In part, the First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." The principles embodied therein have been applied to the states in *Cantwell v. Connecticut* (1940) 310 U.S. 296, 303; *Everson v. Board of Education* (1947) 330 U.S. 1, 14-15; *McCollum v. Board of Education* (1948) 333 U.S. 203, 210-211; *Zorach v. Clauson* (1952) 343 U.S. 306 310.

rabbinic authorities may differ on the question of whether preparation of specific meat conforms to the pertinent law. For example, rabbinic authorities disagree on the effect of the absence of the benediction which normally precedes the act of slaughtering. "One authority has ruled that the absence of the benediction renders the meat non-kosher but the general opinion is that although a benediction should be recited its omission, *post facto*, does not affect the validity of the act." (14 Encyclopaedia Judaica, Shehitah, p. 1338.)

Thus, it is possible that meat which has been considered kosher by authorities in one region will be considered non-kosher by authorities elsewhere. Therefore, despite plaintiffs' assertion to the contrary, the fact that Rabbi Glasner and the United Orthodox Rabbinate of Greater Los Angeles are willing to approve plaintiffs' meat does not require defendants to do the same. Rather, as autonomous entities, defendants are entitled to their own opinions and are obligated by the authority vested in them by the community which they serve to make known their opinion concerning whether particular food products conform with the Judaic dietary laws.

If the trial court were to consider plaintiffs' causes of action, it "would inevitably be faced with such questions as who has the authority to enforce Kashrut in [Los Angeles], what are the criteria for determining whether foods are kosher, and what procedures must the body in charge of Kashrut follow. All of these questions are determinable only by reference to Jewish law, a domain into which the courts will not venture." (*United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc.* (1965) 349 Mass. 595.) Thus, we conclude that the determination of whether food is kosher is an ecclesiastical question unsuitable for adjudication in civil courts.

Plaintiffs assert, however, that since sister states have decided controversies arising from the fact that meat was unkosher, California should do the same. Having analyzed cases cited by plaintiffs, however, we note the court's jurisdiction is proper only insofar as rabbinic authority is not in disagreement over whether the meat is kosher. Thus, jurisdiction will be proper if, after the application of traditional Judaic law to the facts surrounding the preparation of the specific food in question, Jewish religious authorities do not dispute the characterization of the food as kosher. (*Erlich v. Municipal Court* (1961) 55 Cal.2d 553 (upheld constitutionality of Pen. Code, §383b, providing punishment for misrepresentation of unkosher meat as kosher); *Sossin Systems, Inc. v. City of Miami Beach* (1972) 262 So.2d 28 (upheld constitutionality of statute providing punishment for exposure for sale of nonkosher food as kosher); *Cabinet v. Shapiro* (1952) 86 A.2d 314 (no allegation that poultry did not meet all requirements to be characterized as kosher); *Cohen v. Eisenberg* (1940) 19 N.Y.S.2d 678 (parties agree poultry met all traditional requirements of kosher meat); *People v. Gordon* (1940) 16 N.Y.S.2d 833 (parties agreed that meat had been slaughtered in accord with traditional Judaic ritual under proper supervision and that meat was kosher as term had been applied for centuries).) For example, a civil court properly addressed the merits of a case where the plaintiff had sought to establish that the defendant had purposely despoiled the plaintiff's kosher meat in order to render it unkosher. (*Erlich v. Etner* (1964) 224 Cal.App.2d 69.) Similarly, jurisdiction was proper where specific rabbinic authorities' only reason for withholding approval of meat as kosher was the plaintiff's noncompliance with the authorities' new requirements which bore no relation to the requirements of traditional Judaic laws. (*Cabinet v. Shapiro, supra*, 86 A.2d 314; *People v. Gordon, supra*, 16 N.Y.S.2d 833.)

To the contrary, however, if rabbinic authorities' interpretation of Judaic law render disparate findings concerning the status of meat purported to be kosher, the court lacks jurisdiction to settle the dispute. Therefore, we must ascertain whether defendants, by their demurrer, admitted that Acme's meat was slaughtered and prepared in accord with their interpretation of Judaic law.

In their second and third causes of action, plaintiffs allege that "The Defendants RCC and Does I through XV, inclusive, stated to Plaintiff Acme that such approval would be reinstated if the Plaintiff would pay the Defendant SOLOMON SPITZ, the sum of $400.00 per month." Admission to this allegation may reasonably be construed as defendants' acknowledgement that plaintiffs' meat met with their interpretaton of Judaic legal requirements, but that they were withholding their supervision and approval until plaintiffs agreed to pay a $400 per month charge. With respect to causes of action two and three, therefore, we must conclude that defendants were not in disagreement over whether the application of traditional Judaic dietary laws to the facts concerning the slaughter and preparation of Acme's meat rendered that meat kosher. There was, therefore, no ecclesiastical bar to the court's jurisdiction to adjudicate plaintiffs' second and third causes of action. Plaintiff's remaining causes of action will be barred, however, as the complaint contains no allegations of material fact in the remaining causes of action which may be construed as admissions by operation of defendants' demurrer that plaintiffs' meat was kosher. While the remaining causes do contain conclusions of fact which imply that plaintiffs' meat was kosher, such conclusions do not remove the ecclesiastical bar to the trial court's jurisdiction, for a demurrer does not admit conclusions of fact alleged in the complaint. (*Daar v. Yellow Cab Co., supra,* 67 Cal.2d 695, 713.)

Furthermore, we are unimpressed with plaintiffs' assertion that the complaint could have been amended in order to delete any reference to kosher meats, removing the ecclesiastical issue thereby. We direct plaintiffs attention to two procedural facts: (1) plaintiffs opined to the trial court that their complaint could not be amended in order to cure the jurisdictional defect so long as the court held that the determination of the causes of action involved ecclesiastical issues: and (2) plaintiffs suggested to the trial court that their demurrer might be sustained without leave to amend in order "to speed the process up. . . ."

We can only conclude that plaintiffs elected to appeal rather than attempt to remove any defects in the complaint. On review, we are entitled to assume the plaintiff who elects not to amend his complaint has stated as strong a case as possible. (*Hooper v. Deukmejian* (1981) 122 Cal.App.3d 987; *Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 155-156.) Based on this assumption, we find no fault in the trial court's decision to sustain defendants' demurrer without leave to amend.

II

Plaintiffs contend the trial court had jurisdiction to adjudicate their third cause of action which alleged a violation of the Sherman Act.[6] We disagree.

Federal authority has long held that state courts lack jurisdiction to adjudicate alleged violations of the Sherman Act. (*Blumenstock Bros. v. Curtis Pub. Co.* (1919) 252 U.S. 436, 440; accord *Safe Workers' Organization, Chap. No. 2 v. Ballinger* (1974) 389 F. Supp. 903, 911; *Cream Top Creamery v. Dean Milk Company* (1967) 383 F.2d 358, 363.) Thus, the trial court correctly sustained defendants' demurrer to plaintiffs' third cause of action.

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[6] 15 U.S.C., §1.

III

Finally, with respect to their second cause of action, plaintiffs assert the trial court erroneously ruled they had failed to state a cause of action for a violation of the Cartwright Act. We disagree. Business and Professions Code section 16700 et seq. embodies the Cartwright Act, California's antitrust legislation. In order to state a cause of action for violation of the Cartwright Act, three elements must be satisfied: "(1) formation and operation of the conspiracy; (2) illegal acts done pursuant thereto; and (3) damage proximately caused by such acts." (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 718; *Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 20.)

Plaintiffs have failed to establish the third element as the complaint does not allege that plaintiffs Korn and/or Siegel were harmed by defendants' acts. Plaintiffs allege in paragraph 24 that defendants removed the kosher certification ". . . and refuse to provide it to *Plaintiff Acme* . . ." and in paragraph 25 that *"Plaintiff Acme* asked the Defendants RRC and Defendant SUGARMAN to grant their approval and Kashruth certification to the *Plaintiffs' kosher* meat operation . . . ." (Emphasis added.) While these allegations concern the effect of defendants' actions on Acme, they provide no basis for inferring harm to Acme's salesmen, Korn and Siegel. Moreover, paragraphs 25 and 26 are logically inconsistent in that the latter refers to "Plaintiff's application to the Defendants to restore approval to the Plaintiffs' products, . . ." whereas the former speaks only of "Plaintiff Acme."

The central difficulty, however, is embodied in paragraph 29. According to the complaint, defendants intended to "injure and destroy the *Plaintiff's business* by preventing *the Plaintiff* from receiving said Kosher certification

and thereby prevent him from selling his products to retailers and to the kosher-consuming public. Such *injury to the Plaintiff's business* is the direct result of the aforementioned illegal, malicious and wrongful conspiracy and of the acts done in furtherance thereof. As a result of the aforementioned acts, *Plaintiff Acme has suffered damages*. . . ." (Emphasis added.) Clearly, this excerpt alleges damages to plaintiff Acme alone. Having failed to allege damage proximately caused to them, Korn and Siegel have failed to state a cause of action for a violation of the Cartwright Act.

We will affirm the judgment in accord with our general practice where a plaintiff elects not to amend his complaint after a demurrer has been sustained with leave to amend and we have determined that the complaint is objectionable on grounds raised by demurrer. (*Hooper v. Deukmejian, supra,* 122 Cal.App.3d 987, 994; *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 635.)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

SPENCER, P.J.

We concur:

DALSIMER, J.

FAINER, J.*

*Assigned by the Chairperson of the Judicial Council.

Appendix 2

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 1, Civil No. 67958

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

KORN et al.

v.

RABBINICAL COUNCIL OF CALIFORNIA

Appellants' petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed October 28, 1983, which appears at 148 Cal.App.3d 491. (Cal. Const., Art. VI, Section 14; Rule 976, Cal. Rules of Court.)

Bird, C.J. is of the view the opinion should remain published.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405; that on April 19, 1984, I served the within *Petition for Writ of Certiorari* in said action or proceeding by depositing 3 true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

Rafael Chodos
9595 Wilshire Boulevard
Suite 600
Beverly Hills, California 90212
(Counsel for Respondents)

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 19, 1984, at Santa Monica, California.

Robin J. McColgan
(Original signed)

No. 83-1720

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

RALPH KORN and ALEX SIEGAL,

Petitioners,

vs.

RABBINICAL COUNCIL OF CALIFORNIA, an unincorporated association, MARVIN SUGARMAN, PINCHOSE GRUMAN, REUBEN HUTTLER, YALE BUTLER, MELVIN TEITELBAUM and SOLOMON SPITZ,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

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Case No. 83-1720

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Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

SUMMARY OF THE OPPOSITION

There is no jurisdiction under U.S.C. Sec. 1257(3) because no federal right is being pressed here. Instead, plaintiffs merely seek to press rights they claim to have under California law. The decisions of the California courts were based on adequate and independent state law grounds pertaining to ecclesiastical questions. The case never presented a federal question in the first place. Although there was a claim under the Sherman Act, the State courts properly held that they had no jurisdiction of it, and decided nothing in connection with it. The antitrust issues which were decided arose only under California's Cartwright Act.

All the antitrust claims, and all the potential Constitutional issues, were mooted when the only parties who were interested in them failed to take any

appeal from the rulings of the trial court. The case never presented any issues of wide importance. The ecclesiastical questions doctrine is old and settled, and this case merely presents a routine application of it. For this reason, even if jurisdiction otherwise existed to grant certiorari, this Court should decline to grant it.

THE PROCEEDINGS BELOW

This case arose when the Rabbinical Council of California, and various of its member rabbis, declined to certify the products of Acme Meat Company as being kosher. The original complaint was brought by three classes of plaintiffs: the Acme Meat Company, whose Kosher Bosher division was alleged to have sustained antitrust-type damages; Ralph Korn and Alex Siegal [sic], who were salesmen for Acme; and the United Orthodox Rabbinate of Greater Los Angeles ("UORGLA"), which certified Acme's

meat as kosher, but whose certification was not taken seriously by the kosher-concerned public. The complaint sought antitrust relief under the Sherman Act and the Cartwright Act, which is California's antitrust statute. It also sought relief for various torts alleged, none of which are claimed to have had any federal character.

The trial court sustained a demurrer, largely on the grounds that all aspects of the case turned on an ecclesiastical question, namely, whether the meat in question was actually kosher. The ecclesiastical question doctrine is a principle of California constitutional law; and the demurrer was so argued to the trial court. The trial court offered the plaintiffs leave to amend, but they expressly declined it, because they were eager to take their supposed constitutional issues up, and any

further proceedings in the trial court would have slowed down the appellate process. [See the discussion of this point in the Appellate opinion, Appendix 1 to the Petition, at A-10.]

When the appeal was taken, the only parties who took it were Korn and Siegal: neither Acme Meat Company nor UORGLA, the only parties with colorable antitrust claims, participated in the appeal. As far as this Court knows, Acme is now out of the kosher meat business. (In fact, petitioners disclosed to the Court of Appeal, at page 6 of their opening brief, that Acme had gone out of the kosher meat business during the pendency of the appeal.) It was partly for this reason that the Court of Appeal agreed [Opinion, Appendix 1 to Petition, at A-11] that no antitrust issues were presented at the appellate level.

ARGUMENT

I. THERE IS NO FEDERAL QUESTION IN THE CASE.

The case was decided entirely on principles of California state law, and no federal question was ever presented or decided. The petitioners themselves do not base their petition on their Sherman Act claims: even they acknowledge that the California courts were correct when they declined to take jurisdiction of those claims.

The petition is not really clear as to what federal question is alleged to be presented, who presented it in the courts below, or how it was presented there. But if we read the petition generously, the gist of its argument is the notion that the California courts felt themselves bound, under compulsion of the First Amendment to the United States Constitution, to decline

to hear plaintiffs' California antitrust claim in this case, because the case involves kosher meat. The petitioners want this Court to step into the picture to announce to the courts of California that the First Amendment does not compel them to reject state-law antitrust claims merely because the claims revolve around kosher meat.

But the fact of the matter is that the California courts already know this, and the opinion of the Court of Appeal makes this fact clear. Indeed, the opinion contains a formal recognition of the fact that state courts can and do decide cases involving kosher meat: at Appendix 1, page A-8, the Court of Appeal lists the many state cases in which such claims have been entertained. So there can be no question that the California courts did not feel themselves compelled by the Constitution,

but rather chose to apply their own ecclesiastical questions doctrine and to abstain from deciding this case.

The ecclesiastical question doctrine has existed in California for years, and the opinion of the Court of Appeal begins from citation of the most recent California case, Wilson v. Hinkle (1977) 67 Cal.App.3d 506 [See Appendix 1 to Petition, at A-6]. That the doctrine is well established in California law appears not only from that case but also from these earlier ones:

> Permanent Committee of Missions of the Pacific Synod of the Cumberland Church in the United States v. Pacific Synod of the Presbyterian Church, U.S.A (1909) 157 Cal. 105;
>
> Maxwell v. Brougher (1950) 99 Cal. App.2d 824; and
>
> Owen v. Board of Directors of Rosicrucian Fellowship (1959) 173 Cal.App.2d 112.

The doctrine is not properly viewed as establishing either a "right" or a "privi-

lege" or an "immunity" in any person. Instead, it is one of the many rules that courts are free to make for themselves, under which they abstain from deciding certain kinds of cases. These rules have been made over the centuries for a variety of reasons, some having to do with deep-rooted principles, and other having to do merely with division of business between the King's courts and the ecclesiastical ones. When the defendants invoked this doctrine, they did not assert a "right", "privilege", or "immunity": they merely reminded the California courts of their own doctrine. But even if the demurrer were to be viewed as the assertion of some right, it was a right asserted under the law of California, and not under the First Amendment.

It is the rule in this Court that the record must make it clear that a federal

question, as distinct from a state law question, was presented below. Where both state and federal constitutional laws are relied on, this Court will assume that it was the state constitutional grounds which supported the state court decision. New York Central & H. R. Co. v. New York, 186 U.S. 269, 273.

In this case, the record makes it clear that the opinion below stood on firm principles of California law. The appellate opinion begins with Wilson v. Hinkle, supra, and enunciates the California doctrine. The fact that California constitutional analysis parallels a similar analysis found in the federal cases, does not mean that a federal Constitutional question arises every time California interprets its own laws. Of course, where the decision below stands on adequate state grounds, this Court will not review the judgment.

Fox Film v. Muller, 296 U.S. 207.

II. THE CASE IS MOOT

The gist of the case is the antitrust damage alleged to have been suffered by Acme Meat. But petitioners, appellants below, made the following statements in their opening brief:

> As a result of the respondents [sic] conduct in preventing appellants from marketing its products ACME had to shut down its Kosher operations during the pendency of this appeal and the appellants were totally denied of their livelihoods.
>
> Opening Brief, page 6, lines 6-8

It is thus clear that as to Acme Meat, the only real party in interest in the antitrust claims, the case is moot.

III. PETITIONERS ARE NOT THE REAL PARTIES IN INTEREST

It is settled law that neither officers, employees nor shareholders of corporations which suffer antitrust injuries can bring antitrust actions in their own names. This is a point of law on which both the California and federal cases are quite clear, and in accord.

Kaufman v. The Dreyfus Fund, 434 F.2d 727

Ash v. IBM Corporation, 353 F.2d 491, cert. den'd 384 U.S. 927

Reibert v. Atlantic-Richfield Corp., 471 F.2d 727, cert. den'd 411 U.S. 398

Krigbaum v. Sbarbaro, 23 Cal.App. 427

A B C Distributing Co. v. Distillers Distributing Corp., 154 Cal. App.2d 175

Witt v. Union Oil, 99 Cal.App.3d 435

In considering the Petition for Certiorari, this Court should abide by the rule that the petitioner must show that he, and not some third party, is the real party in interest.

After all, a person cannot invoke the jurisdiction of this court to vindicate the right of a third party. Liberty Warehouse v. Burley Tobacco Growers' Co-op, 276 U.S. 71, 88. But Petitioners here are seeking to vindicate the rights of persons who chose not to become parties to the appeal. This Court should not grant their petition.

IV. EVEN IF THERE WERE GROUNDS OF JURISDICTION, THIS COURT SHOULD DECLINE TO EXERCISE IT

Because Acme Meat did not appeal, the case is effectively moot: the parties who might have had a stake in it no longer do. This is one reason this Court should not grant the petition.

But there is another reason: this case does not present any questions of broad importance. It is already well settled law that the courts will enforce laws affecting kashrut in cases in which the central question is non-ecclesias-

tical [Hygrade Provision Co. v. Sherman, 266 US 497, repeatedly cited in the Petition]. But in cases where the central question is ecclesiastical, courts will not get involved [United Kosher Butcher Association v. Associated Syunagogues of Greater Boston, Inc., 349 Mass. 595, cited in the opinion]. These are the broad principles, which are already well settled, and familiar. This case is merely a routine application of settled principles.

CONCLUSION

The case is not a proper one for the exercise of certiorari jurisdiction under the meaning of 28 U.S.C. 1257(3), because there is no federal question presented in the case, and if there were one, it is not properly preserved for this Court now. The decision of the courts below rests on adequate state grounds, and the parties who petition, and who appealed, never had standing to press the antitrust claims in the first place. As to the real parties in

interest, the case is moot.

Even if there were jurisdiction, this is not a good case in which to exercise it, because the case is moot; and all the legal issues involved are well settled and quite familiar.

For all these reasons, certiorari should be denied.

Respectfully submitted,

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